

1 DAVID H. KRAMER, State Bar No. 168452  
CHARLES T. GRAVES, State Bar No. 197923  
2 RIANA S. PFEFFERKORN, State Bar No. 266817  
WILSON SONSINI GOODRICH & ROSATI  
3 Professional Corporation  
650 Page Mill Road  
4 Palo Alto, CA 94304-1050  
Telephone: (650) 493-9300  
5 Facsimile: (650) 565-5100  
Email: dkramer@wsgr.com

6 Attorneys for Plaintiff  
7 Twitter, Inc.

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 TWITTER, INC., a Delaware corporation, )  
13 Plaintiff, )  
14 v. )  
15 SKOOTLE CORP., a Tennessee corporation; JL4 )  
WEB SOLUTIONS, a Philippines corporation; )  
16 JUSTIN CLARK, an individual, d/b/a )  
TWEETBUDDY.COM; JAMES KESTER, an )  
17 individual; JAYSON YANUARIA, an )  
individual; JAMES LUCERO, an individual; and )  
18 GARLAND E. HARRIS, an individual, )  
19 Defendants. )

CASE NO.: 3:12-CV-1721 LB

PLAINTIFF TWITTER, INC.'S  
OPPOSITION TO DEFENDANT  
GARLAND E. HARRIS'S MOTION  
TO DISMISS PLAINTIFF'S  
COMPLAINT

Hearing Date: TBD  
Time: TBD  
Before: TBD

1 **INTRODUCTION**

2 Plaintiff Twitter, Inc. (“Twitter” or “Plaintiff”) filed the instant action against Defendant  
3 Garland E. Harris (“Harris” or “Defendant”) on April 5, 2012, alleging claims for breach of  
4 contract,<sup>1</sup> fraud, and unfair or deceptive business practices under state and common law. (ECF  
5 No. 1). Harris, proceeding *pro se*, moved to dismiss Twitter’s Complaint on May 11, 2012.<sup>2</sup>  
6 (ECF No. 23). Harris’s motion raises a number of specious arguments in opposition to the  
7 Complaint, primarily directed to supposed procedural defects, yet remains conspicuously silent  
8 as to the merits of Plaintiff’s claims about Harris’s unlawful and fraudulent conduct. Because all  
9 of Defendant’s challenges to the Complaint must fail, as further explained below, Plaintiff  
10 respectfully requests that the court deny Defendant’s motion to dismiss the Complaint.

11 **ARGUMENT**

12 **I. The Court Has Subject Matter Jurisdiction over Plaintiff’s Claims Against Harris**

13 Defendant argues that the court lacks subject matter jurisdiction over Twitter’s claims  
14 against him for various reasons, all of which are unavailing.

15 **A. Legal Standard**

16 Dismissal under Federal Rule of Civil Procedure 12(b)(1) is appropriate when the district  
17 court lacks subject matter jurisdiction over the claim. FED. R. CIV. P. 12(b)(1). A Rule 12(b)(1)  
18 attack may be either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation  
19 omitted). A facial challenge goes to the sufficiency of the pleadings to show jurisdiction,  
20 whereas a factual attack alleges that no jurisdiction exists despite the formal sufficiency of the

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21  
22 <sup>1</sup> Twitter’s user agreement, which comprises the Twitter Terms of Service (“Terms”), the  
23 Twitter Rules, and Twitter’s Privacy Policy (collectively the “TOS”), is attached to the  
24 Complaint as Exhibit A. (See ECF No. 1, ¶ 26 & Ex. A). Plaintiff notes that it updated the TOS  
on May 17, 2012, and that the version of the TOS in effect when the Complaint was filed is now  
available at [http://twitter.com/tos/previous/version\\_5](http://twitter.com/tos/previous/version_5) (last visited May 19, 2012).

25 <sup>2</sup> Defendant’s deadline to respond to the Complaint pursuant to Federal Rule of Civil  
26 Procedure 12(a)(1)(A)(i) was May 3, 2012. (ECF No. 10). The certificate of service for the  
27 motion to dismiss states that the motion was served on May 10, 2012, making it untimely under  
28 Rule 12. (ECF No. 25). Prior to that date, Plaintiff filed a motion for entry of default against  
Harris, which has yet to be decided by the court. (ECF No. 16). Plaintiff hereby renews its  
motion for entry of default against Harris for failure to timely serve the motion to dismiss.

1 complaint. *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1184 (N.D. Cal.  
2 2011) (citations omitted). For facial attacks, the inquiry is confined to the allegations in the  
3 complaint. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). For factual attacks, the court  
4 need not presume the truthfulness of the plaintiff's allegations, and may properly look beyond  
5 the complaint without converting the motion to dismiss into one for summary judgment. *White*,  
6 227 F.3d at 1242 (citations omitted).

7 **B. Plaintiff Has Sufficiently Alleged the Minimum Amount in Controversy**

8 Defendant contends that Twitter has insufficiently alleged the requisite amount in  
9 controversy for this court to exercise subject matter jurisdiction over Plaintiff's claims pursuant  
10 to 28 U.S.C. § 1332(a), solely because the Complaint alleges that Plaintiff spent "at least  
11 \$75,000" just on anti-spam efforts to combat Defendant's wrongdoing.<sup>3</sup> (ECF No. 23, ¶ 1, ll. 3-  
12 12; *see* ECF No. 1, ¶ 25). However, the Complaint expressly alleges that the amount in  
13 controversy exceeds the jurisdictional threshold with respect to each defendant, including Harris.  
14 (ECF No. 1, ¶¶ 11, 62). Also, Defendant's cherry-picking ignores the other cognizable damages  
15 Plaintiff alleges, which count toward the total amount in controversy. Plaintiff alleges damages  
16 of at least \$75,000 in anti-spam efforts alone, and on top of that, also alleges entitlement to other  
17 relief including but not limited to an injunction and exemplary and punitive damages, as more  
18 fully set forth in the prayer for relief. (ECF No. 1, ¶¶ 75, 80; p. 20, ll. 5-8). Therefore, it is  
19 facially evident from the Complaint that Plaintiff in good faith has alleged that more than  
20 \$75,000 is in controversy. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 401-02 (9th Cir.  
21 1996).

22 Moreover, even taken in isolation, the wording cited by Defendant is perfectly sufficient  
23 to meet the amount-in-controversy requirement. A party "is entitled to stay in federal court  
24 unless it is legally certain that less than \$75,000 is at stake. If the amount is uncertain then there  
25 is potential controversy, which is to say that *at least* \$75,000 is in controversy in the case."

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27 <sup>3</sup> Defendant concedes he is domiciled in the State of Florida, *i.e.*, diverse from Plaintiff, and  
28 does not contest the court's jurisdiction on the basis of citizenship. (ECF No. 23, ¶ 3, ll. 15-16).

1 *McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008) (emphasis added; citation and  
2 quotation omitted). *See also Andrews v. E.I. Du Pont de Nemours & Co.*, 447 F.3d 510, 514 (7th  
3 Cir. 2006) (“The question is whether the amount in controversy is *at least* \$75,000 exclusive of  
4 costs and interest.” (emphasis added)); *Johnson v. Myers*, No. 11-CV-00092 JF (PSG), 2011 WL  
5 4533198, at \*3 (N.D. Cal. Sept. 30, 2011) (“claims worth *at least* \$75,000” (emphasis added)).

6 Since Twitter has sufficiently alleged the existence of diversity jurisdiction in this case,  
7 the court should likewise reject Defendant’s argument that, as a traditionally state-law matter,  
8 contract claims should not “waste the valuable time of the United States Federal Court System.”  
9 (ECF No. 23, ¶ 1, ll. 17-18). It is beyond question that this court has jurisdiction over purely  
10 state- and common-law civil actions properly brought in diversity, such as the instant case, *see*  
11 28 U.S.C. § 1332(a)(1), and judicial economy is better served when the court does not have to  
12 “waste its valuable time” on frivolous arguments in the course of deciding such actions.

### 13 **C. The CAN-SPAM Act’s Definition of Spam Is Irrelevant**

14 Defendant next makes the equally spurious argument that the court lacks subject matter  
15 jurisdiction because Twitter’s use of the term “spam” does not comport with the CAN-SPAM  
16 Act, 15 U.S.C. § 7701 *et seq.* (ECF No. 23, ¶ 1, ll. 20-24). Irrespective of whether it is  
17 jurisdictional, CAN-SPAM’s definition of “spam” doubtless would be critical in the context of a  
18 CAN-SPAM case. *See N.B. Indus. v. Wells Fargo & Co.*, No. 10-CV-03203 LB, 2010 WL  
19 4939970 (N.D. Cal. Nov. 30, 2010) (claims under federal Junk Fax Prevention Act dismissed  
20 where defendants’ faxes did not fall under statutory definition of “advertisements”). However,  
21 the Complaint does not include a CAN-SPAM claim, so that statute is irrelevant here. Plaintiff  
22 defines the term “spam” to refer to Tweets on Twitter, not e-mail messages, in the Complaint,  
23 and proceeds from there as the basis for its claims against Defendant.<sup>4</sup> (ECF No. 1, ¶¶ 19-21).  
24 Defendant’s subject-matter jurisdiction challenge to the Complaint therefore fails.

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25  
26 <sup>4</sup> Also, as alleged in the Complaint, Twitter defines “spam” in its TOS, which Plaintiff  
27 alleges Defendant agreed to and then violated through his conduct, so Defendant cannot  
28 colorably contend that he was not on notice of Twitter’s definition of the word such that he  
should escape liability for his acts. (ECF No. 1, ¶¶ 26-31, 55-57).

## 1    **II.      The Court Has Personal Jurisdiction over Defendant Harris**

2            Next, Defendant contests the court's personal jurisdiction over him under Federal Rule of  
3 Civil Procedure 12(b)(2), thereby placing the burden on Plaintiff to show that jurisdiction is  
4 appropriate. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). As explained below, this  
5 court has personal jurisdiction over Defendant both because he consented to it and because,  
6 independent of his consent, the court has specific jurisdiction over him.

7            First, the Complaint alleges, and Defendant does not deny, that Defendant agreed to  
8 Twitter's TOS. (ECF Nos. 1, ¶¶ 26-31; 23, ¶¶ 1, 5). By agreeing to Plaintiff's TOS, Defendant  
9 consented to the TOS's "Controlling Law and Jurisdiction" clause, which provides, in pertinent  
10 part, "All claims, legal proceedings or litigation arising in connection with the Services will be  
11 brought solely in San Francisco County, California, and you consent to the jurisdiction of and  
12 venue in such courts and waive any objection as to inconvenient forum." (ECF No. 1, Exh. A, p.  
13 28).<sup>5</sup> Forum selection clauses such as this are presumed to be valid, *M/S Bremen v. Zapata Off-*  
14 *Shore Co.*, 407 U.S. 1, 10 (1972), and a defendant's acceptance thereof shows consent to  
15 personal jurisdiction in the forum specified. *See SEC v. Ross*, 504 F.3d 1130, 1149 (9th Cir.  
16 2007). Indeed, in a case highly similar to the instant action, this court recently found that a  
17 defendant consented to its jurisdiction by agreeing to Terms of Use containing a forum selection  
18 clause employing similar language to Plaintiff's. *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F.  
19 Supp. 2d 1039, 1052-53 (N.D. Cal. 2010). Defendant Harris has not disputed the enforceability  
20 of Plaintiff's forum selection clause, nor is there any reason why the court should not enforce it  
21 against him. *Id.* (citing *Zenger-Miller, Inc. v. Training Team, GmbH*, 757 F. Supp. 1062, 1069  
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23            <sup>5</sup> The TOS's "Controlling Law and Jurisdiction" clause provides, in pertinent part, "All  
24 claims, legal proceedings or litigation arising in connection with the Services will be brought  
25 solely in San Francisco County, California, and you consent to the jurisdiction of and venue in  
26 such courts and waive any objection as to inconvenient forum." (ECF No. 1, Ex. A, p. 28). *See*  
27 *also* Twitter Previous Terms of Service, Version 5, [http://twitter.com/tos/previous/version\\_5](http://twitter.com/tos/previous/version_5) (last  
28 visited May 19, 2012). As noted *supra* n.1, this was the operative version of the TOS at the time  
the Complaint was filed. For the forum selection clause in the current version of the TOS, which  
likewise provides that a user agreeing to the TOS consents to the jurisdiction of this court, *see*  
<http://twitter.com/tos>.

1 (N.D. Cal. 1991)). The court should therefore find that Defendant’s agreement to Plaintiff’s  
2 TOS constituted consent to personal jurisdiction in this court.

3 Separately, the court also has specific jurisdiction over Defendant under California’s  
4 long-arm statute, which “is co-extensive with federal due process requirements.” *Id.* at 1053  
5 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004)); CAL CIV.  
6 PROC. CODE § 410.10 (“A court of this state may exercise jurisdiction on any basis not  
7 inconsistent with the Constitution of this state or of the United States.”). Federal due process  
8 requires that a nonresident defendant have sufficient “minimum contacts” with the forum state  
9 “such that the exercise of personal jurisdiction does not offend traditional notions of fair play and  
10 substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The minimum  
11 contacts inquiry in the Ninth Circuit is a three-part test: (1) defendant must have purposefully  
12 availed himself of the privilege of conducting activities in the forum state (here, California), for  
13 contract claims, or, for tort claims, must have purposefully directed his conduct toward  
14 California; (2) the claim must arise out of or relate to the defendant’s forum-related acts; and (3)  
15 exercising jurisdiction must be reasonable. *Schwarzenegger*, 374 F.3d at 802-03; *Rano v. Sipa*  
16 *Press*, 987 F.2d 580, 588 (9th Cir. 1993) (citations omitted).

17 The first of these factors is the most critical. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d  
18 414, 416 (9th Cir. 1997). To satisfy the second factor, the plaintiff must show that its injury  
19 would not have occurred “but for” the defendant’s forum-related conduct. *Myers v. Bennett Law*  
20 *Offices*, 238 F.3d 1068, 1075 (9th Cir. 2001). Once a plaintiff has established the first two  
21 prongs, the burden shifts to the defendant to show unreasonableness under the third prong.  
22 *Schwarzenegger*, 374 F.3d at 802 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78  
23 (1985)). *See also Pac. Atl. Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1329-30 (9th Cir.  
24 1985) (setting forth seven-factor reasonableness inquiry).

25 For contract claims, purposeful availment “typically consists of evidence of the  
26 defendant’s actions in the forum, such as executing or performing a contract there. By taking  
27 such actions, a defendant purposefully avails itself of the privilege of conducting activities within  
28 the forum State, thus invoking the benefits and protections of its laws.” *Schwarzenegger*, 374

1 F.3d at 803 (citation and quotation marks omitted). Plaintiff's Complaint alleges that Defendant  
2 executed a contract with Twitter, which is California-based, by entering into the TOS, which is  
3 governed by California law, to use the service provided by Twitter from its principal place of  
4 business in California, then sent spam over that service in contravention of Defendant's  
5 contractual agreement with Plaintiff, thereby harming Plaintiff in California.<sup>6</sup> (ECF No. 1, ¶¶ 4,  
6 12-13, 26-31, 55-57 & Exh. A, p. 28). Defendant thus purposefully availed himself of the  
7 privilege of conducting activities in California under the auspices of California law, and  
8 Plaintiff's contract claims against Defendant would not have arisen but for his California-related  
9 conduct.

10 For tort claims, purposeful direction is evaluated under the three-part "effects" test  
11 originating in *Calder v. Jones*, 465 U.S. 783 (1984): the defendant must allegedly have (1)  
12 committed an intentional act (2) expressly aimed at the forum state, (3) causing harm that the  
13 defendant knows is likely to be suffered in the forum state. *Dole Food Co., Inc. v. Watts*, 303  
14 F.3d 1104, 1111 (9th Cir. 2002). A plaintiff's "showing that a defendant purposefully directed  
15 his conduct toward a forum state ... usually consists of evidence of the defendant's actions  
16 outside the forum state that are directed at the forum." *Schwarzenegger*, 374 F.3d at 803  
17 (citation omitted).

18 The Complaint alleges that Harris, who resides in Florida, intentionally used Twitter's  
19 service, provided from its California headquarters, to send spam to Plaintiff's users advertising  
20 his online auction and online payment websites. The Complaint bases its tort claims against  
21 Defendant on allegations that this conduct harmed Twitter in California by damaging users'  
22 goodwill toward Plaintiff and causing Plaintiff to lose users, and that Defendant also caused  
23 Plaintiff significant monetary harm in the form of costly anti-spam efforts which Twitter would  
24 not have incurred but for Defendant's conduct. The Complaint expressly alleges that Harris  
25

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26 <sup>6</sup> The TOS state, "These Services are operated and provided by Twitter Inc., 795 Folsom  
27 Street, Suite 600, San Francisco, CA 94107." (ECF No. 1, Ex. A, p. 28). Because he agreed to  
28 the TOS, Defendant was on notice of the fact that Twitter operates and provides its services from California.

1 repeatedly, knowingly, improperly, and purposefully directed his intentional activities toward  
2 California, thereby causing harm he knew was likely to be suffered by Twitter in California.<sup>7</sup>  
3 (ECF No. 1, ¶¶ 4, 9, 12-13, 25, 55-57). Plaintiff thus has demonstrated that Defendant's acts  
4 "were intentionally directed at Plaintiff, a company headquartered in the forum state, and the  
5 harm caused by Defendant[] was felt in California. As such, Plaintiff[']s claims arise out of  
6 Defendant[']s forum-related contacts because the harm to Plaintiff would not have occurred but  
7 for Defendants' actions." *Craigslist*, 694 F. Supp. 2d at 1054. *See also eBay Inc. v. Digital*  
8 *Point Solutions, Inc.*, 608 F. Supp. 2d 1156, 1162 (N.D. Cal. 2009) (personal jurisdiction existed  
9 "because of the multiple alleged contacts with [plaintiff's] computer system in this district" and  
10 because "[t]he alleged harm resulting from such contacts also occurred in this district").

11 Plaintiff having established the first two prongs of specific jurisdiction, the burden shifts  
12 to Defendant to show unreasonableness under the third prong. *Schwarzenegger*, 374 F.3d at 802  
13 (citation omitted). Defendant does not meet this burden. His sole argument against the exercise  
14 of jurisdiction over him is the contention that he "has not conducted business in California for  
15 over 3yrs. [sic] which predates involvement with the Plaintiff," supported only by the statement  
16 in his affidavit that Plaintiff's allegation that he does business in California "is patently false."<sup>8</sup>

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17  
18 <sup>7</sup> As noted *supra* n.6, Harris was on notice that Twitter is located in California.

19 <sup>8</sup> Defendant's supporting declaration also alleges that it is "ludicrous" for Plaintiff to contend  
20 that "dealing with a website located on worldwide redundant servers constitutes doing business  
21 in California." (ECF No. 24, ¶ 6, ll. 7-9). This is a legal conclusion rather than a factual  
22 statement, so it is inappropriate to a sworn affidavit and should not be considered by the court.  
23 Furthermore, it is unclear what Defendant means by "worldwide redundant servers"; to the  
24 extent that Defendant is attempting to argue that Plaintiff's servers are not located in California,  
25 he has introduced no competent evidence thereof. "WHOIS records are maintained by domain  
26 name registrars that make domain name contact and ownership information searchable and  
27 available to the public." *Express Media Group, LLC v. Express Corp.*, No. 06-CV-03504 WHA,  
28 2007 WL 1394163, at \*1 (N.D. Cal. May 10, 2007). Defendant included only a truncated  
portion of the WHOIS record for Twitter.com in his declaration, namely, the portion showing  
that Twitter's domain name registrar is located in Australia. (ECF No. 24, ¶ 6, ll. 9-15).  
However, this shows nothing about Plaintiff. Plaintiff asks that the court take judicial notice of  
the fact that Twitter's servers are located in San Francisco, California, as shown by the full  
WHOIS record for Twitter.com, which lists a San Francisco, California address. *See Liberty*  
*Media Holdings, LLC v. Vinigay.com*, No. 11-CV-280-PHX-LOA, 2011 WL 7430062, at \*5 n.10  
(D. Ariz. Dec. 28, 2011) (report and recommendation taking judicial notice of location of  
plaintiff's Internet server and describing court's method for determining same), *adopted in full*,  
2012 WL 641579 (D. Ariz. Feb. 28, 2012).



(ECF Nos. 23, ¶ 2, ll. 6-8; 24, ¶ 6, ll. 6-7). This is insufficient to controvert Plaintiff's arguments. Defendant admits that he has been "involved" with Twitter, without contesting Plaintiff's allegations that he used the Twitter service to spam Twitter's users. His denial that he has "conducted business in California" at most appears to be an argument directed toward general jurisdiction, which Plaintiff does not argue the court may exercise over Defendant, as it is an "exacting standard" that requires "continuous and systematic general business contacts" that "approximate physical presence" in the forum state. *Schwarzenegger*, 374 F.3d at 801 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); further citation omitted). However, the lack of general jurisdiction does not make the exercise of specific jurisdiction unreasonable. Because Defendant consented to this court's jurisdiction over him and has not demonstrated that it would be unreasonable to exercise specific jurisdiction over him independent of his consent, Defendant's motion to dismiss for lack of personal jurisdiction must be denied.

### **III. This Court Is the Proper Venue and Forum for Plaintiff's Action**

Next, Defendant conclusorily asserts pursuant to Federal Rule of Civil Procedure 12(b)(3) that venue in this district is improper. (ECF No. 23, ¶ 5, ll. 10-16). A civil action may be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2).<sup>9</sup> As alleged in the Complaint, Plaintiff's principal place of business is San Francisco, and Defendant used Plaintiff's service to send spam Tweets, thereby harming Plaintiff in this district: Plaintiff has lost goodwill and users due to Harris's wrongdoing, and has expended considerable money and personnel resources in efforts to combat it. (ECF No. 1, ¶¶ 4, 12-13, 23, 25, 55-57). Because "some or all of the predicate acts underlying [Plaintiff's] claims are alleged to have occurred in this district," venue here is proper. *eBay Inc.*, 608 F. Supp. 2d at 1162 (plaintiffs sued defendants over software code that forced users' browsers to visit plaintiff's site, causing improper placement of a cookie that subsequently

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<sup>9</sup> Previously 28 U.S.C. § 1391(a)(2).

1 caused eBay to pay defendants; court held that, were it not for enforceable Los Angeles-specific  
2 forum selection clause, venue would be proper in the Northern District of California).

3 Defendant invokes the doctrine of *forum non conveniens*, even though, as he himself  
4 notes, the doctrine is typically applied to cases involving events that occurred in a foreign  
5 country, unlike his alleged acts in this case. (ECF No. 23, ¶ 3, ll. 12-15). Under this doctrine, “a  
6 court may resist imposition upon its jurisdiction” even when venue is formally proper. *Carijano*  
7 *v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (citations and quotation  
8 omitted). However, the doctrine is “an exceptional tool to be employed sparingly,” so “a party  
9 moving to dismiss based on *forum non conveniens* bears the burden of showing (1) that there is  
10 an adequate alternative forum, and (2) that the balance of private and public interest factors  
11 favors dismissal.” *Dole Food*, 303 F.3d at 1118 (citations and quotation marks omitted).  
12 Defendant has made no effort to meet this burden beyond citing the distance between his Florida  
13 domicile and this court. (ECF No. 23, ¶ 3, ll. 12-16). He points to no factors of private interest  
14 for the court to weigh in the balance against the ““strong presumption in favor of the plaintiff’s  
15 choice of forum.”” *Carijano*, 643 F.3d at 1227 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S.  
16 234, 255 (1981)). And tellingly, he has not moved for change of venue to a court closer to home.  
17 See 28 U.S.C. § 1404. In light of Defendant’s conclusory argument, application of the extreme  
18 doctrine of *forum non conveniens* is uncalled-for here.

19 Finally, as discussed above with regard to personal jurisdiction, Defendant’s agreement  
20 to the TOS constituted consent to the forum selection clause therein, which provides for this  
21 court as a proper forum. Defendant thereby consented to jurisdiction and venue in this court  
22 while waiving any objection as to inconvenient forum. (ECF No. 1, Exh. A, p. 28).<sup>10</sup> Defendant  
23 therefore may not contest the instant action on grounds of improper forum or venue, and his  
24 motion to dismiss should be denied on these grounds.

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26 <sup>10</sup> See also Twitter Previous Terms of Service, Version 5,  
27 [http://twitter.com/tos/previous/version\\_5](http://twitter.com/tos/previous/version_5) (last visited May 19, 2012). As noted *supra* n.1, this  
28 was the operative version of the TOS at the time the Complaint was filed. For the forum  
selection clause in the current version of the TOS, which likewise provides for this court as a  
proper forum, see <http://twitter.com/tos>.

1 **IV. Plaintiff Properly Served Process on Defendant Harris**

2 Next, pursuant to Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5), Defendant  
3 asserts that process and service of process on him were deficient. (ECF No. 23, ¶ 4).  
4 Defendant's allegation that the summons issued as to him does not bear the court's seal, as  
5 required by Federal Rule of Civil Procedure 4(a)(1)(G) (*id.*), is unavailing given that the court's  
6 seal is visible in the summons. (ECF No. 3, p. 2). Defendant does not otherwise challenge the  
7 form of process. Accordingly, dismissal under Rule 12(b)(4) is unwarranted.

8 Defendant also challenges sufficiency of service under Rule 12(b)(5), putting the burden  
9 on Plaintiff to show that service was valid under Federal Rule of Civil Procedure 4. *Brockmeyer*  
10 *v. May*, 383 F.3d 798, 801 (9th Cir. 2004). "A signed return of service constitutes prima facie  
11 evidence of valid service which can be overcome only by strong and convincing evidence." *SEC*  
12 *v. Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1166 (9th Cir. 2007) (citation and quotation  
13 marks omitted). Plaintiff filed the return of service on Harris, executed by Plaintiff's process  
14 server under penalty of perjury, representing that the server is at least 18 years of age and not a  
15 party to this action, and that Defendant was personally served with the summons, a copy of the  
16 Complaint, and other documents on April 12, 2012.<sup>11</sup> (ECF No. 10). In response, Defendant's  
17 supporting declaration asserts only that service was "improper." (ECF No. 24, ¶ 10, ll. 7-8).  
18 This conclusory denial does not meet Defendant's burden for rebutting the presumption of  
19 proper service. *Freeman v. ABC Legal Servs. Inc.*, No. 11-CV-3007 EMC, 2011 WL 6090699,  
20 at \*8 (N.D. Cal. Nov. 10, 2011) (citations omitted). Since Defendant has produced no facts to  
21 controvert Plaintiff's evidence of valid service, Defendant's motion should be denied on this  
22 ground.

23 **V. Plaintiff Has Sufficiently Stated a Claim for Breach of Contract**

24 Finally, Defendant moves to dismiss Plaintiff's breach of contract claim for failure to  
25 state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

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26  
27 <sup>11</sup> The return of service also states that service was effected pursuant to California service  
28 rules. (ECF No. 10, p. 1). Plaintiff has thus made a *prima facie* showing that service was proper  
under both Rule 4(e)(1) and 4(e)(2). FED. R. CIV. P. 4(e)(1)-(2).

1 (ECF No. 23, ¶ 5).<sup>12</sup> A Rule 12(b)(6) motion “tests the legal sufficiency of a claim.” *Navarro v.*  
2 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). In evaluating the motion, a court must consider  
3 whether, taking all of the plaintiff’s allegations as true, the complaint alleges “enough facts to  
4 state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,  
5 550, 570 (2007); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996)  
6 (complaint’s allegations must be taken as true). “The plaintiff’s complaint need not contain  
7 detailed factual allegations, but it must contain more than a ‘formulaic recitation of the elements  
8 of a cause of action.’” *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d 1018, 1022 (N.D. Cal.  
9 2010) (quoting *Twombly*, 550 U.S. at 555). In evaluating the motion, the court may consider  
10 documents attached to or incorporated by reference into the complaint, as well as matters  
11 properly subject to judicial notice. *Id.* (citing *Parks School of Bus., Inc. v. Symington*, 51 F.3d  
12 1480, 1484 (9th Cir. 1995)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,  
13 322 (2007) (“courts must consider the complaint in its entirety, as well as other sources courts  
14 ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents  
15 incorporated into the complaint by reference, and matters of which a court may take judicial  
16 notice”).

17 Defendant’s only argument is that Twitter’s TOS limit its remedy for a user’s breach of  
18 contract to permanent suspension of the breaching user’s account. Defendant argues that  
19 Plaintiff has already terminated his account and has therefore exhausted its remedies against him.  
20 (ECF Nos. 23, ¶ 5, ll. 7-16; 24, ¶ 3). It is unclear which account Defendant is referring to, out of  
21 the many tens of thousands the Complaint alleges he has created to promote his spamming  
22 activities (ECF No. 1, ¶ 56), but that detail is irrelevant regardless. While the TOS indeed  
23 provide that Twitter may terminate a user’s account for TOS violations, they do not constrain  
24 Twitter to the sole remedy of account termination. Rather, the TOS provide that California law  
25

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26  
27 <sup>12</sup> Defendant erroneously cites to Rule 12(b)(5). (ECF No. 23, ¶ 5, l. 5). However, it is clear  
28 from the context that Defendant meant to cite subsection (6), and Plaintiff has already addressed  
Defendant’s actual Rule 12(b)(5) argument, regarding insufficient service of process, *supra*.

1 governs the TOS “and any action related thereto.” (*Id.*, p. 28). And California law allows  
2 money damages for breach of contract:

3 For the breach of an obligation arising from contract, the measure of damages,  
4 except where otherwise expressly provided by this Code, is the amount which will  
5 compensate the party aggrieved for all the detriment proximately caused thereby,  
6 or which, in the ordinary course of things, would be likely to result therefrom.

7 CAL. CIV. CODE § 3300. The Complaint accordingly seeks money damages against Harris for his  
8 material breaches of the TOS. (ECF No. 1, ¶ 62). Seeking such a remedy for breach of the TOS  
9 is as much Plaintiff’s right as the account termination right it has already exercised. Defendant  
10 does not otherwise contest the sufficiency of Plaintiff’s breach of contract allegations.

11 Therefore, Defendant’s motion to dismiss that claim should be denied.

12 Finally, it bears noting that Defendant’s motion challenges only Plaintiff’s breach of  
13 contract claim, without mentioning Plaintiff’s two other claims against Harris. (ECF No. 23, ¶  
14 5). Accordingly, even if the court were to find Defendant’s Rule 12(b)(6) argument persuasive  
15 as to the breach of contract claim, dismissal of the other two causes of action against Harris (for  
16 fraud and unlawful and/or fraudulent business practices) would be unwarranted.

### 17 **CONCLUSION**

18 For the reasons stated above, Plaintiff respectfully requests that this court deny  
19 Defendant’s motion to dismiss the Complaint against him.

20 Dated: May 25, 2012

Respectfully submitted,

21 /s Charles T. Graves

22 David H. Kramer

Charles T. Graves

23 Riana S. Pfefferkorn

WILSON SONSINI GOODRICH & ROSATI

24 650 Page Mill Road

Palo Alto, CA 94304-1050

25 Telephone: (650) 493-9300

26 Facsimile: (650) 565-5100

Email: dkramer@wsgr.com

27 Email: tgraves@wsgr.com

Email: rpfefferkorn@wsgr.com

28 ***Attorneys for Plaintiff Twitter, Inc.***